No. 20284

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARY CARSON LEWIS, ET AL., APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION OF THE UNITED STATES, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE APPELLEES

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OPINION BELOW

The memorandum of decision of the district court appears in the record at pages 61-63.

JURISDICTION

Appellants sought to invoke the jurisdiction of the district court under the Act of February 6, 1901, sec. 1, 31 Stat. 760, as amended, 36 Stat. 1167, 25 U.S.C. sec. 345, providing for actions for allotments. It is the position of appellees that the district court lacked jurisdiction. On April 19,

1965, the district court dismissed the action for declaratory relief and for injunction on the ground that the land involved was acquired land and not subject to laws relating to the public domain (R. 61-63, 70-71). Notice of appeal was filed June 17, 1965 (R. 73). The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether lands which have been acquired by the United States by condemnation for a naval reservation and have been declared surplus by the General Services Administration are subject to Indian allotment under the General Allotment Act of February 8, 1887.

2. Whether the district court was correct in dismissing an action to enjoin officers of the General Services Administration from disposing of lands which have been declared surplus, when the United States had not consented to be sued.

STATUTE INVOLVED

The pertinent portion of the Act of February 28, 1958, sec. 5, 72 Stat. 27, 40 U.S.C. sec. 472(d), reads as follows:

Sec. 5. The Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended, is hereby further amended by revising section 3(d) to read as follows:

"(d) The term 'property' means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of lands so withdrawn or reserved which the Secretary of the Interior, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government."

STATEMENT

On February 26, 1965, appellants filed this action, entitled a complaint for declaratory relief and for injunction relating to Indian allotment (R. 2-10). The allegations of the complaint may be summarized as follows: Plaintiffs are Indians entitled to allotment under the General Allotment Act, Section 4,

Act of February 8, 1887, as amended, 25 U.S.C. sec. 334, and their claims to allotment to selected parcels of land which th had previously filed in the Bureau of Land Management, Riversi California, had been threatened by actions of the defendants. The lands in question had been used as a portion of Camp George Elliott, United States Naval Reservation, and had been declare to be excess to the needs of the United States. The Secretary of the Interior had not determined that the lands were not sui able for return to the public domain, and was without authorit to do so. The property is not surplus within the meaining of 40 U.S.C. sec. 471(c), and the General Services Administration is without authority to act as a holding agency of the property to offer it for sale, to accept bids from the public relating t the sale of the property, to open bids and award the property t bidders, and in any other way to deal with the property. Defen ants threatened to sell the property to the highest private bid der, on March 3, 1965, and thus deprive plaintiffs of their rig to acquire the allotments applied for. Defendants' intention t sell the property would prevent plaintiffs from exhausting thei

dministrative or judicial remedies, but defendants had refused o delay the sales until a final administrative and judicial de- ision on the applications for allotments. The prayer was for he following relief:

(1) The issuance of a temporary restraining order mmediately enjoining defendants from further advertising the roperty for sale, from opening the sealed bids as scheduled, nd enjoining and restraining defendants from selling the lands o any bidder. (2) That the court, for its final judgment, ermanently restrain and enjoin the defendants from proceeding ith the sale of the land unless and until plaintiffs have had final determination in the Department of the Interior and in he courts as to their rights to allotments on the lands in ques- ion. (3) That the court, after an appropriate hearing, issue ts preliminary injunction for the same purpose as the aforesaid emporary restraining order. (4) That defendants prepare and eliver to plaintiffs a list of the names and addresses of all rospective bidders of the land. (5) For such other and fur- her relief as to the court may seem just and proper. Named as efendants are: The General Services Administration of the United

States of America, and six of its agents and employees; the United States of America; John Does 1 through 2,000, inclusive, who are alleged to have made bids to purchase the subject lands and Richard Roes 1 through 50, who are alleged to be agents, officers, servants, or employees of the General Services Administration of the United States of America.

On March 2, 1965, the court entered an order that the defendants show cause why they should not be restrained and enjoined from awarding any bids for the sale of the property in question (R. 26-27). On March 10, 1965, the defendants filed an opposition to the order to show cause, and a motion to dismiss on the following grounds: (1) This is a suit against the United States, to which it has not consented. (2) The jurisdiction over the lands involved has never been granted to the Department of the Interior, and the lands are not subject to allotment under 25 U.S.C. sec. 334. (3) The court has no jurisdiction over the control, administration, or disposal of federal "purchased" property. (4) The complaint does not state a cause of action upon which relief can be granted. (R. 40-41).

laintiffs filed an opposition to the motion based on the com-laint, brief in support of petition for temporary injunction, nd oral argument to be presented to the court (R. 52).

On April 1, 1965, the court filed a memorandum of de-ision, stating that the case hinges on the provisions of 40 .S.C. sec. 472(d), which defines property which is subject to isposal of surplus property under 40 U.S.C. sec. 471(c). The ourt stated that there is a distinction between public land nd acquired land, and concluded that Section 472(d) pertains nly to lands withdrawn or reserved from the public domain and ot lands reacquired by the Government. The court held that the efendants had shown cause why an injunction should not issue, nd that "the action should be and is hereby dismissed." (R. 61-3). On April 19, 1965, a judgment of dismissal was entered (R. 0-71). This appeal followed (R. 73-74).

SUMMARY OF ARGUMENT

A. The General Allotment Act of 1887 does not apply o "acquired lands" of the United States, but only to "public and" or the "public domain." Entries under the general land

laws may be made only where the United States had indicated that its lands are held for disposal under those laws. Rawson v. United States, 225 F.2d 855 (C.A. 9, 1955), cert. den., 350 U.S. 934; Thompson v. United States, 308 F.2d 628 (C.A. 9, 1962); Oklahoma v. Texas, 258 U.S. 574 (1922). In defining "property" which may be disposed of as surplus property of the United States, 40 U.S.C. sec. 472(d) excludes the public domain lands. All other property, including property acquired by purchase or condemnation for a specific governmental use, is property within the definition. The property here involved is acquired property and has been declared excess by the Department of the Navy. It has been termed surplus property by the Administrator, General Services Administration, and he has the authority to dispose of it under 40 U.S.C. sec. 484.

B. This is an unconsented suit against the United States. The land involved is owned by the United States, and the injunctive relief sought would expend itself against the land. Thus, the United States is an indispensable party to the litigation. White v. Administrator of General Services Admin.

of U.S., 343 F.2d 444 (C.A. 9, 1965). The only jurisdictional allegation of the complaint is 25 U.S.C. sec. 345, which grants jurisdiction to the district court in an action respecting allotments of Indian lands, and consent is given to sue the United States. This is not a suit for an allotment. It is a suit for injunction and the allotment statute does not include suits for injunction against the United States, nor authorize court control of transfers of jurisdiction between the General Services Administration and the Department of the Interior.

ARGUMENT

THE DISTRICT COURT CORRECTLY DISMISSED THIS ACTION

We believe there are two clear grounds which compel affirmance of the judgment. Although, logically, the question of sovereign immunity from this suit is jurisdictional, we discuss first the ground taken by the district court, which demonstrates that appellants plainly have no case on the merits of their claim.

A. The General Allotment Act of 1887 does not apply to "acquired lands" of the United States. - Appellants contend

that the lands in question are public lands, and that they are entitled to allotments under the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. sec. 334, which provides for allotments to Indians "upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, * * *." Appellants here have the same difficulty as did the appellant in Thompson v. United States, 308 F.2d 628 (1962), where this Court stated (p. 631): "Appellant's difficulty is that he fails to recognize the distinction between 'public land' and 'acquired land.'" "Public domain" or "public lands" were authoritatively defined in Newhall v. Sanger, 92 U.S. 761, 763 (1875), where the Supreme Court declared that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." That has been quoted and reaffirmed in numerous cases. Union Pacific R.R. Co. v. Harris, 215 U.S. 386, 388 (1910); Minnesota v. Hitchcock, 185 U.S. 373, 391 (1902); Barker v. Harvey, 181 U.S. 481, 490 (1901); Mann v. Tacoma Land Company, 153 U.S. 273, 284 (1894); Bardon v. Northern Pacific Railroad, 145 U.S. 535, 538 (1892). "Public domain" has the same meaning. Barker v. Harvey, supra.

The question of general land laws applying to "acquired lands" has been before this Court in the last several years in two cases: Thompson v. United States, supra; and Rawson v. United States, 225 F.2d 855 (1955), cert. den., 350 U.S. 934. In both cases the Court held that the mining laws had no relation to "acquired lands," but only to lands forming part of the "public domain." In pointing out the distinction between "public land" and "acquired land," the Court stated in the Thompson case (pp. 631-632):

> Each was defined with commendable clarity in Barash v. Seaton, 1958, 103 U.S.App.D.C. 159, 256 F.2d 714, 715, as follows: "Acquired land is Government owned land acquired from private ownership. Public land is Government owned land which was part of the original public domain." These definitions are quoted with approval in Murray v. United States, 8 Cir., 1961, 291 F.2d 161. Since the lands in question were not public lands within the meaning of the phrase as used in the National Forest Act, and since the lands in question were acquired by the United States for a specific purpose, our decision is controlled by the opinion of the United States Supreme Court in Oklahoma v. Texas, 1922, 258 U.S. 574, 599, 600, 42 S.Ct. 406, 66 L.Ed. 771, and the opinion of this circuit in Rawson v. United States, 9 Cir., 1955, 225 F.2d 855, cert. den. 350 U.S. 934, 76 S.Ct. 306,

> 100 L.Ed. 816. * * * In Rawson, this court held that there was no authority for a mineral location on lands which had been acquired by the United States for use in connection with an emergency relief project and in so holding, held that Title 30 U.S.C.A. §22 must be read in the light of the entire enactment of which it was but a part, and that when so read, the section embraces land owned by the United States, but not all lands so owned. [Emphasis by Court] It is there held that it was only where the United States had indicated that the lands are held for disposal under the general land laws that a mineral location might be filed. [Emphasis added].

The district court correctly followed this Court's decisions in the Rawson and Thompson cases, supra, and also Oklahom v. Texas, 258 U.S. 574 (1922), cited by this Court in the above quotation (R. 62-63). Appellants attempt to distinguish those cases on the ground that the lands involved were still held for the purposes for which they were acquired, and the subject lands were "surplus, unappropriated, and unreserved at the time of selection by plaintiffs" (Br. 12-13). This results from appellants' misunderstanding of the law as shown by their statement that at such time as federally owned land becomes unappropriated, "it is by definition returned to the public domain" (Br. 11). This is contrary to this Court's ruling in the Rawson case, where it stated (225 F.2d 858):

> * * * The Stoller tract, purchased by the government for prescribed uses, does not fall within the category of public land. It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain. Absent legislation or authoritative directions to the contrary, they remain in the class of lands acquired for special uses, * * *.
>
> Traditionally, the public lands of the United States have been administered by the Department of the Interior, whereas here, as already noted, the acquired land involved had been authoritatively transferred to the Department of Agriculture for administration by that agency. The placing of these lands under the jurisdiction of the latter Department in itself refutes any notion that such lands were subject to the general land or mining laws.

To hold otherwise would create an irrational distinction between those acquired lands the title to which had once been part of the public domain, and those lands, of which there are of course a very substantial quantity, that had never been part of the public domain, and hence could not be "returned to the public domain."1/

1/ Whether the subject land in California was originally public domain, or was part of a Spanish or other recognized grant, does not appear.

The lands here involved have been placed under the jurisdiction of the General Services Administration, 40 U.S.C. sec. 484, and the Department of the Interior has never had any control or jurisdiction over them. How, then, could that Department issue allotments to appellants?

In its memorandum of decision (R. 61-63), the court stated that this "case hinges on the provisions of section 472 of Title 40, U.S. Code." This section is quoted supra, p. 3. The court also quoted from the Senate and House Committee reports which accompanied the bill, which appear in U.S. Code Congressional and Administrative News, 85th Cong., 2d sess. (1958) Vol. 2, pp. 2227-2256. A section-by-section analysis of the bill is given. At page 2239, in regard to Section 1, the following statement was made:

> The committee, in employing the term "public lands," intends it to apply in its technical or legal sense, as distinguished from "reserved public lands" or "withdrawn public lands," and "acquired public lands."

At pages 2243 -2244, in discussing Section 5 of the bill (40 U.S.C. sec. 472(d)), the following statement was made:

Section 5 would amend in two particulars the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended.

First, it would except from the real property-disposition provisions of the 1949 act, minerals in withdrawn or reserved public domain lands which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws.

Second, it amends the 1949 act to provide that only those withdrawn or reserved public domain lands surplus to the needs of Federal agencies found by the Secretary of the Interior --with the concurrence of the Administrator of General Services--not suitable for restoration to public land status by virtue of their having been substantially changed in character by improvements, or otherwise, would hereafter be subject to the real property disposition provisions of the amended 1949 act.

Both of these amendments would clarify the operation of existing law; one would make it clear that only when determined by the Secretary to be not suitable for mining or mineral leasing purposes would the mineral estate pass with the title to the surface estate being disposed of under surplus property provisions; the other would reverse the roles of the Secretary and the Administrator so as to provide that the Secretary would make an initial judgment of the nature with which his Department is most familiar--suitability of lands for public land uses, a traditional Interior function and if the Administrator concurs in a finding of nonsuitability, the lands would be disposed of as surplus.

This statement was also quoted by the district court, and followed by the holding that "There is a distinction between public land and acquired land," citing the Rawson case, and quoting from it at page 858, as follows:

> * * * It may be stated as a universal proposition that patented lands reacquired by the United States are not by mere force of the reacquisition restored to the public domain.

The court concluded that Section 472(d) pertains only to lands withdrawn or reserved from the public domain and not lands reacquired by the Government. Moreover, the section itself vests in the Secretary of the Interior, with the concurrence of the General Services Administrator, the authority to determine whether lands are suitable for return to the public domain for disposition under the public land laws. Appellants are simply asking the courts to exercise this authority instead of allowing Congress to exercise its plenary power to dispose of the propert of the United States.

There is nothing in appellants' quotation from the reports on the subject bill from U.S. Code Congressional and Administrative News (Br. 9-11) which would indicate that the property

ce involved was subject to entry under the General Allotment
c, 25 U.S.C . sec. 334. It is clear that the definition of
perty in Section 472(d) excludes the public domain lands and
nds withdrawn from the public domain over which the Bureau of
nd Management, Department of the Interior, has jurisdiction
d which are subject to the general land laws. All other prop-
ty, including property acquired by purchase or condemnation
r a specific governmental use, and the subject property was
acquired, is property within the definition of 40 U.S.C. sec.
2(d). Since the property described in the complaint has been
clared excess by the Department of the Navy, and has been
rmed surplus property by the Administrator, General Services
ministration, the Administrator has the authority to dispose
the property under 40 U.S. sec. 484.

B. This is an unconsented suit against the United States.-
e land involved is owned by the United States, and the injunctive
lief sought would expend itself against that land. Thus, the
ited States is an indispensable party to this litigation, unless
e matter falls within the only two recognized exceptions which per
t suit against government officers respecting property as to which

they assert an interest of the United States. The two exceptions are (1) that the officers were acting beyond their statutory duty or (2) that their actions were constitutionally void.

Appellants do not allege or urge either exception. Even accepting their allegations as establishing a wrong, that "does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." Dugan v. Rank, 372 U.S. 609, 620-622 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Mine Safety Co. v. Forrestal, 326 U.S. 321 (1945); Goldberg v. Daniels, 231 U.S. 218 (1913). "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under normal rules of agency." Larson v. Domestic & Foreign Corp. 337 U.S. 682, 695 (1949); Switzerland Company v. Udall, 337 F.2d 57 (C.A. 4, 1964).

In White v. Administrator of General Services Admin. of U.S., 343 F.2d 444 (1965), this Court held that a suit for mandamus ordering conveyance of land on behalf of the United States by its agent is a suit against the United States and it

ould have to be a party to the suit. The Court stated (p. 445): Except as agents of the United States the appellees would have ad no authority to make a contract to convey land belonging to he United States, or to make the deed which they did make, whether that deed was in compliance with the terms of the con- ract or not."

The only jurisdictional allegation contained in the complaint is 25 U.S.C. sec. 345 (R. 5), and this appears to be the basis for naming the United States as a defendant. That section grants jurisdiction to the district court in an action respecting allotments of Indian lands, and consent is given to sue the United States. The present suit is not for an allotment. It is for an injunction against officers of the General Services Administration, who are agents of the United States. The waiver of sovereign immunity under 25 U.S.C. sec. 345 is narrow and specifically limited. It does not include suits for injunction against the United States. "To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental

functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued." Morrison v. Work, 266 U.S. 481, 485-486 (1925). The Morrison case demonstrates that the mere attempt to assert negative interference with land disposal does not avoid the objection of sovereign immunity.

Before the court could make any adjudication regarding allotment, it would have to order that the property be transferred to the public domain. This would require affirmative relief against the United States. It is well settled that affirmative relief against the United States cannot be granted by the courts. Larson v. Domestic & Foreign Corp., supra.

There is no allegation in the complaint that the Administrator has abused his discretion, nor that he does not have th authority to dispose of the subject property. On the contrary, the complaint alleges that the General Services Administration has "refused to transfer jurisdiction of said lands to the Depar ment of the Interior." (R. 6). No authority is cited for the

proposition that the court has jurisdiction to require such a transfer, and we submit that where Congress has specifically provided by law that the Administrator, in his discretion, may dispose of surplus property, such disposal is not a subject over which the "judicial power" of the United States is extended, but is a field in which the authority of the Congress is supreme. Standard Oil Co. of California v. United States, 107 F.2d 402, 409 (C.A. 9, 1940), cert. den., 309 U.S. 654, 673. Nor could this case be tortured into one under the mandamus statute, 28 U.S.C. sec. 1361, to compel the defendants to perform a ministerial duty, since the statute clearly grants the Secretary of the Interior and the Administrator of General Services discretion to make the appropriate determination.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.[2/]

Respectfully,

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OCTOBER 1965

2/ Since, for the reasons stated, we think the court clearly properly dismissed the complaint, we do not explore at length another defect in plaintiffs' case which arises from the fact that the statute, 25 U.S.C. sec. 334, applies "Where any Indian not residing upon a reservation * * * shall make settlement * * *." It does not appear that appellants have made settlement.

CERTIFICATE OF EXAMINATION OF RULES

I certify that I have examined the provisions of Rules 18 and 19, C.A. 9, and that in my opinion the tendered brief conforms to all requirements.

ROGER P. MARQUIS
Attorney, Department of Justic